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No. 87-671

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

STATE OF CONNECTICUT, CITY OF NEW YORK, NATIONAL LEAGUE OF CITIES, and AMERICAN CIVIL LIBERTIES UNION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

BRIEF FOR PETITIONERS IN REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR PETITIONERS IN REPLY

Petitioners respectfully reply to the brief in opposition of the Federal Respondents, Federal Communications Commission ("FCC") and the United States of America, and the brief in opposition of the National Cable Television Association, Inc. ("NCTA").

The Federal Respondents suggest that the FCC was given virtually unlimited discretion to fashion its "effective competition" rules. (Br. for Fed. Resp. at 7–8). That grant of discretion did not, however, allow the FCC to ignore the

"unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Yet that is precisely what the FCC did by misstating the statutory purposes of the Cable Communications Policy Act of 1984 ("Cable Act"), disregarding statutory definitions of critical terms, and ignoring precise statutory language in fashioning its rules.[1]

Respondents essentially argue that the Cable Act was a deregulatory manifesto which allowed the FCC to deregulate basic cable service rates in nearly every cabled community in the United States. (See, *e.g.*, NCTA Br. at 8). They, however, overlook the fact that the Cable Act "is essentially a compromise," *Central Cable Television Co. of Fla. v. Admiral's Cove Associates, Ltd.*, 835 F.2d 1359, 1361 (11th Cir. 1988), citing 130 Cong. Rec. H 10, 442 (daily ed. Oct. 1, 1984) (statement of Rep. Dingell) and Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on Coaxial Wires*, 19 Ga. L. Rev. 543, 545-46 (1985). Thus, Congress sought to "establish franchise procedures and standards which [not only] encourage the growth and development of cable systems [but also] *assure that cable systems are responsive to the needs and interests of the local community.*" 47 U.S.C. § 521(2) (emphasis added). It is noteworthy that the FCC deliberately misstated the Cable Act's statutory purposes by omitting the underscored language from consideration when it promulgated the "effective competition" rules. (App. A56).

The Federal Respondents never explain why the FCC, in purporting to define "effective competition" for "basic cable service," could ignore the statutory definition of the latter term. 47 U.S.C. § 522(2). (See Pet. at 9-10). Indeed, they somehow

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[1] Contrary to the Federal Respondents' suggestion (Fed. Resp. Br. at 11, n.2), it is not insignificant that the Court has decided to hear another case involving an FCC order implementing the Cable Act challenged as disregarding clear Congressional intent. *City of New York v. FCC, cert. granted*, No. 87-339 (Nov. 30, 1987).

manage to ignore the fact that the Court of Appeals, "applying the 'traditional tools of statutory construction,' *Chevron*, 467 U.S. at 843 n.9," rejected the FCC's attempt to administratively redefine "basic cable service" in determining which tiers of service are subject to regulation. (App. A155).

The Federal Respondents likewise fail to explain why the FCC could ignore the precise statutory mandate to "define the circumstances in which a *cable system* is subject to effective competition." 47 U.S.C. § 543 (b)(2)(A) (emphasis added). The FCC clearly departed from that mandate when it defined "effective competition" for "basic cable service" rather than for a "cable system." In asserting that Congress gave the FCC no precise instruction (Fed. Resp. Br. at 8), the Federal Respondents simply ignore the statutory language and its plain meaning.

The Federal Respondents suggest that review by the Court is inappropriate because the outcome of the remand proceeding could diminish the practical importance of the "effective competition" rules. (Fed. Resp. Br. at 6). This suggestion overlooks, however, the limited scope of the remand proceeding, in which the FCC apparently intends to reconsider only its signal "availability" standard and not its "effective competition" standard. Indeed, the Further Notice of Proposed Rulemaking issued by the FCC on remand is expressly limited to reconsideration of the signal "availability" standard. *Implementation of Cable Communications Policy Act of 1984*, 52 Fed. Reg. 36801 (Oct. 1, 1987). Even if 10 percent of all cable systems were to be reregulated after the remand proceeding, roughly 90 percent of all cable systems will remain deregulated.[2]

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[2] The FCC's "effective competition" rules currently preclude 1,225 (or about 99.5 percent) of the 1,231 cities that were direct members of the National League of Cities ("NLC") at the time of the proceedings below from regulating basic cable service rates. NLC Comments III at 19, ¶¶ 30-31 and Ex. B.

The Federal Respondents also suggest that this case is inappropriate for review because "the Commission is monitoring the effect of its three-signal rule . . . so that amendments can be made, if needed, and in order to report to Congress by 1990." (Fed. Resp. Br. at 6.) Such monitoring efforts are meaningless if the FCC disregards the Cable Act's unambiguously expressed intent. Respondent NCTA further suggests that Congress may amend the Cable Act if unhappy with the FCC's implementation. (NCTA Br. at 9). That speculative possibility hardly excuses the FCC's present disregard of clear Congressional intent.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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